.... This price-setting process is highly disaggregated and advertisers have the ability to turn quickly to, at a minimum, the other television stations within the DMA. This substantially reduces, if not eliminates entirely, the ability of any station or group of stations to impose noncompetitive terms and conditions of sale on their advertiser-customers.[55]

Therefore, concerns about significant Hhi resulting from local station mergers should be tempered by the theoretical nature of the HHI and the actual market characteristics which inevitably would stifle attempts to exploit market power in any anticompetitive manner.

Finally, the Commission lacks evidence of the abuse of any market power in the local advertising market. This is a critical factor.[56] Numerous LMAs have provided at least a theoretical potential for abuse of market power. Yet, no one has provided the Commission with any probative evidence that market power has been abused in any LMA market.

Therefore, the record evidence and sound antitrust analysis provide no basis for refusing to relax the duopoly rule based on the threat to competition in the local advertising market.

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[55]NERA (Malrite) at 19.

[56]*Further Notice* at ¶53.

B. The Market for Delivered Video Programming Is Extraordinarily Competitive.

Consumer choices with respect to transmission media and program selection are more than abundant. No more do three network affiliates and a handful of independent stations in a few markets divide the audience pie.[57] In the top 100 markets today, the broadcast portion of the audience (barely half of all viewing) is divided among (on average) nearly eight stations.[58] Cable television service is

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[57]*See, e.g., Report and Order*, 11 FCC Rcd 546, 560-561 (1995)[hereinafter cited as *PTAR*].

[58]*Third Annual Report* at 50-51. Even in the so-called 100+ markets, an average of nearly five stations per market is available to viewers. *Id.*; *see also PTAR*, 11 FCC Rcd at 561. As noted in the Comments of the Freedom of Expression Foundation, Inc., MM Docket No. 91-221 (filed May 17, 1995) at 12-13, *citing Second Report and Order*, MM Docket No. 87-7, 4 FCC Rcd 1741, 65 RR 2d 1589, 1593 (1989):

> [S]ince 1970 the number of broadcast outlets at the local level has increased dramatically throughout small, medium, and large sized media markets. According to the FCC's findings, the top 25 markets average 13.4 over-the-air television signals, 29.8 commercial AM stations, 29.2 commercial FM stations, 41.9 programmed cable channels in use with a 44% penetration rate, 2.8 locally published or significantly read newspapers, 12 significantly-read magazines, and a VCR penetration rate of 54.1%. And, as far as the smaller markets are concerned, they too have an abundance of communications outlets. For example, the smallest media markets (market size 201-209) have about nine radio and television outlets, as well as an average access to an additional 20 cable channels. Finally, although the number of significantly read daily newspapers declines from 2.8 dailies in the top 25 markets to 0.7 in markets 201-209, the average number of significantly read magazines remains relatively constant at about 11 for each market group.
>
> Although there has been a tremendous growth in the number of media outlets on a national basis, the fact that the smaller markets have an abundance of new sources of information demonstrates that there is substantial diversity on the local level as well. For example,

available to over 96% of television households, and four out of five cable systems offer their subscribers 30 or more channels of video programming.[59] Four different sources of DBS programming are available to virtually every household in the country.[60] Several new DBS providers are waiting in the wings.[61] Other video media, such as wireless cable (MMDS), open video systems, and internet video are emerging as additional competitors for viewers.[62] Local television stations, consequently, now are the sole source of transmitted video programming for only one quarter of all television households.[63]

> 94% of the television households in the U.S. Receive five or more TV signals, up from 79% in 1979.

See also LSOC Comments at 5. ("[T]he number of broadcast stations providing television programming today [1995] ... is more than double the number that were providing such services in 1964....[I]n 1964 there were only three television networks, with no realistic probability of a fourth network in sight. Today, of course, there are seven networks, including FOX, PBS, and the two new United Paramount Network ("UPN") and Warner Brothers ("WB") network services."); *see also* Comments of New World Communications Group Incorporated, MM Docket No. 91-221 (filed May 17, 1995) at 23.

59 *Third Annual Report* at 11-12.

60 *Third Annual Report* at 21.

61 *Third Annual Report* at 24.

62 *Third Annual Report* at 29 *et seq.*

63 *Third Annual Report* at 51.

What was once a virtual monopoly for local broadcasters (and the three networks) has felt the ravages of this new and ever-expanding competition from multichannel media. This is no secret to the Commission.[64] For example, the viewing share of the four major networks during prime time in the 1995-1996 season was 62%.[65] In cable homes, cable network and program viewing is approaching parity with broadcast television.[66] Thus, as the Commission stated when it decided to repeal the prime time access rule, "No single network or network affiliate would seem to have the ability to dominate video programming distribution in any of these [top 50] local markets."[67]

1. Limiting the market analysis to broadcast television stations is ridiculous on its face.

Broadcast stations compete directly with cable networks and local cable programming for audience, as well as with similar programming provided by DBS and other multichannel video providers. The substantial shift of audience from broadcast to cable television networks (on cable, DBS, and other multichannel services) leaves no rational doubt that consumers consider such programming a substitute for broadcast programming. The Commission tentatively has agreed that

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64 *See, e.g.*, OPP Report.

65 *Third Annual Report* at 50. The two emerging networks, UPN and WB had a combined prime time share of 9%. *Id.*

66 *Id.*

67 *PTAR*, 11 FCC Rcd at 561.

local commercial and public television stations and cable systems are the "economically relevant alternative suppliers of delivered video programming."[68] LSOC wholeheartedly concurs with the Commission that cable systems must be included in the relevant product market for delivered video programming. The ongoing shift of audience from broadcast to cable programming confirms that the Commission is correct. Consumers are *substituting* cable programs for broadcast programs. If broadcast viewing had remained stable, then some basis might have existed for doubts about the substitutability of cable for broadcast programming, but that has not been the pattern of viewing.[69] Thus, consumer behavior demonstrates that broadcast and cable programming are direct competitors for viewer attention, thereby confirming that inclusion of cable systems in the relevant product market is a sound and inevitable determination.

LSOC also urges the Commission to include all other multichannel video providers in the relevant product market. This is especially appropriate in the case of DBS, which is available to nearly all television households. Much of the programming offered by DBS providers is cable network programming like that

[68]*Second Further Notice* at 15. Nonetheless, the Commission has asked for comment on whether cable television may be considered a substitute for broadcast television. *Second Further Notice* at 14.

[69]As the Commission noted in concluding that video programming may be a sufficiently different economic product from other forms of entertainment, "the quantity demanded of delivered video programming has remained stable," suggesting that video programming is an economically distinguishable product from other leisure activities. *Second Further Notice* at 13, n. 40.

offered by local cable systems.[70] That programming is no less competitive with or substitutable for broadcast programming in the consumer's eyes when provided by a DBS or MMDS provider rather than a cable system. In any event, the Commission hardly may exclude other multichannel providers like MMDS and OVS because few viewers as yet subscribe to them or because they may remain unavailable to others. As the EI Study concluded:

> The competitive significance of cable, DBS, and other non-broadcast video delivery modes does not depend on their adoption by all or even most television households.... It is the presence of these alterative delivery systems and their ability rapidly to take dissatisfied viewers away from broadcast television that is important, not their present scale of operation. Further, the fact these alternative media are not available to each and every TV household in a given viewing area does not mean that they provide ineffective competitive restraints on broadcasters. Broadcasters cannot discriminate between those viewers who have and those who do not have competitive alternatives. Hence, those viewers who do have alternatives, if sufficient in number, protect the interest of those who do not.[71]

Therefore, no multichannel video provider rationally may be ignored in analyzing the level of competition in the local video distribution market.

LSOC also reiterates that VCRs are excluded arbitrarily from the Commission's definition of the relevant product market. As LSOC previously has

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[70]Indeed, Congress and the Commission have smashed the exclusivity barriers which previously had prevented noncable multichannel providers from securing exhibition rights to cable network programming. 47 U.S.C. 548 (1996).

[71]EI Study at 10-11. In this respect, of course, cable and DBS are essentially ubiquitous. Cable now passes in excess of 96.7% of all television households. *Third Annual Report* at 11. DBS service from multiple providers is virtually universally available in the continental United States. *Third Annual Report* at 19.

pointed out, the VCR is used as a substitute for what could be viewed on broadcast or cable television.[72] As similarly observed by the EI Study:

> It is hard to argue that a family sitting down to watch a video cassette movie during prime time is not in many or most cases substituting this programming for broadcast or cable programming, or that morning viewers of a Jane Fonda exercise videotape are not doing the same.[73]

To exclude VCRs from the relevant market, therefore, is arbitrary.[74]

The Commission, therefore, must adopt a more expansive view of the relevant product market for video program distribution.

2. Various multichannel media offer a wide range of programming to consumers.

The widespread availability of multichannel media offering numerous program options for viewers is a fact. The Commission's latest report to Congress on the status of competition in the market for delivered video programming reveals that:

- Cable passed 92.7 million homes at the end of 1995 or 96.7% of all television households. Cable then had 62.1 million subscriber households or 67% of homes passed and an increase of 2.8%, the second largest annual increase in over 15 years.[75]

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[72] LSOC Comments at 19.

[73] EI Study at 11-12.

[74] LSOC also must note considerable reason to include non-electronic media in the relevant market. *See* Reply Comments, MM Docket No. 91-221 (filed July 10, 1995, by LSOC) at 17-19 [hereinafter cited as "LSOC Reply"]; *see also* EI Study at 12-13.

[75] *Third Annual Report* at 12.

- Nearly 80% of cable systems, serving 97.3% of all cable subscribers, then offered subscribers 30 or more channels. Only 5.4% of cable systems offered subscribers 12 or fewer channels. Nearly half of all subscribers are served by systems with 54 or more channels.[76]

- At the end of October, 1996, DBS served 3.82 million subscribers.[77] They typically received 100-200 channels of programming.[78]

- Wireless cable service was available to nearly 30 million homes at the end of 1995. Approximately 900,000 homes subscribed.[79]

- Slightly over a million homes subscribe to SMATV services as of September, 1996, a 10.5% increase over the preceding year.[80] The average SMATV system provides nearly 40 channels of programming.[81]

- Just entering the market are local exchange carriers and internet video providers.[82]

Each of these multichannel providers is growing and will enhance competition in local markets more as each day passes.[83]

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[76] *Third Annual Report* at 12.

[77] *Third Annual Report* at 20.

[78] *Third Annual Report* at 21-23.

[79] *Third Annual Report* at 31.

[80] *Third Annual Report* at 46.

[81] *Third Annual Report* at 47.

[82] *Third Annual Report* at 39-45, 55-58.

[83] *See also, e.g.*, EI Study at 10; LSOC Comments at 8-14.

3. Regardless of the breadth of the relevant market, common ownership of two stations in the same market would pose no threat to competition in the local market for delivered video programming.

Local markets for delivered video programming are highly competitive and would not be susceptible to anticompetitive harms in the event two local television stations are commonly owned or operated. Again, the EI Study has analyzed several illustrative markets to determine the level of competition and assess the potential risk of competitive harm in the event two stations merged. Again, the EI Study concluded:

> Analysis of several illustrative DMAs suggests that concentration among video suppliers tends to be moderate, and concentration would be lower still if data were available for all market participants. No single firm is likely to have significant market power, nor is the collective exercise of market power likely in the supply of video programming to viewers.[84]

The EI Study went on to state that:

> In DMAs where there is now vigorous competition among many television stations, cable operators, and other providers, joint ownership of stations could occur without reaching levels of concentration that would raise competitive concerns. In New York and Cleveland, for example, even the station with the largest viewership share could acquire another station in the same DMA without exceeding the safe harbor concentration levels of the DOJ/FTC *Merger Guidelines*. Many mergers of smaller stations in these and other DMAs would likewise be within the safe harbor.[85]

Again, where Hhi might raise some concerns about potential for anticompetitive exploitation of market power, the EI Study pointed out that:

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[84] EI Study at 17.

[85] EI Study at 88.

> Even with Hhi exceeding 1,800 in some DMAs, anticompetitive behavior in local markets for viewers is unlikely. Anticompetitive behavior by a broadcast station would involve reducing the quality of programming below the competitive level. In principle, stations could reduce programming quality by agreeing to reduce expenditures on programming. In practice, payments made for programming are subject to negotiation and cannot be observed by other stations. The problems of coordinating a reduction in program quality are further complicated by including operators of cable, MMDS, and other video systems and providers of video cassettes. These firms may prefer to increase price rather than reduce quality, which would introduce further coordination problems. All these factors make an anticompetitive agreement to reduce programming quality unlikely. The same factors would impede a "cooperative" or "consciously parallel" or "tacitly collusive" outcome. For these reasons, a given transaction may not be anticompetitive even though the HHI exceeds 1,800.[86]

Indeed, one can only imagine the reaction of a DBS provider to the owner of two stations in one local market who proposed a reduction in program quality in the market.

Finally, again, the Commission has been presented with no evidence to the contrary. Despite the existence of numerous LMAs, where such market power might be assumed, no one has come forward with any probative evidence of harm to competition.

Therefore, the record establishes clearly that competition in the market for delivered video programming in no way would be imperiled by common ownership of two stations in a single market.

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[86] EI Study at 17.

C. The Video Program Production Market Is Highly Competitive.

The video program production market is highly competitive. It is inhabited by numerous sellers and numerous buyers. The Commission already has found that "demand for video programming is not concentrated" and that "[t]he supply side of the video programming production market is no more concentrated than the demand side."[87] The Commission, thus, has concluded that "no buyers or sellers, acting alone or together, are likely to be able to exercise undue market power in the video programming production market. In addition, entry barriers are low."[88] These findings and conclusions are no less pertinent in this proceeding. Although the issue herein revolves around local markets, the Commission has recognized that video program production market is essentially a national market:

> The *TV Ownership Further Notice* also discussed the effects of the local ownership rule on the video program production market. These effects, however, raise lesser concerns than the potential effects on other markets as the video program production market is more national in scope. Producers of video programming typically create product which is marketed for broadcast in more than one local market.[89]

This only echoes the Commission's prior recognition that the video program distribution market is "clearly national and perhaps international in scope, because

[87] *PTAR*, 11 FCC Rcd at 564-565; *see also Second Report and Order*, 8 FCC Rcd 3282, 3308 (1993), *aff'd sub nom. Capital Cities/ABC v. FCC*, 29 F. 3d 309 (7th. Cir. 1994).

[88] *PTAR*, 11 FCC Rcd at 566.

[89] *Further Notice*, 10 FCC Rcd at 3572.

television broadcasters obtain a large portion of their programs from national providers."[90]

The record provides more than ample support for the Commission's position and establishes that common ownership of two stations in the same market would cause no injury to competition in the video program production market. The EI Study observes that "there is significant competition among broadcast stations and others to purchase video programming." It concludes that

> The purchase of national rights to video programming by networks, syndicators, station groups and others is unconcentrated. It is extremely unlikely that television station groups could obtain or exercise market power in purchasing video programming. Television stations also compete in local markets for video program rights. Though concentration among stations and other local purchasers is higher in some local areas, the exercise of monopsony or oligopsony power is unlikely.[91]

As LSOC has stated, assuming the existence of a local market for programming -- and the propriety of the Commission's concern for such a market --, permitting common ownership of two stations in the same market would accord the licensee insufficient market power, given the number of outlets available, over the local program production market or any of the various factors of production.[92]

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[90]*PTAR*, 11 FCC Rcd at 563, *citing Further Notice*, 10 FCC Rcd at 3545.

[91]EI Study at 46-47.

[92]LSOC Comments at 20.

LSOC also noted, again, implicitly acknowledging the national scope of the relevant market, that "having ... two stations in one local market will not give the local station owner sufficient market power to outbid a larger group owner (or an alternative multichannel video service provider) who has more markets to offer the programmer."[93]

Furthermore, the likelihood of acquiring any meaningful degree of market power is declining by the moment as cable television continues to increase its position in the market.[94] Cable's share of expenditures for programming, now at about 26% are expected to climb to 29% by 1999.[95] Broadcast stations' share is expected to decline marginally to just under 20% in the same time period.

In short, no two local stations under common ownership will possess the market power or ability to reduce competition in the market for video program production, an essentially national market inhabited by numerous strong sellers and buyers.

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[93]LSOC Comments at 21.

[94]*See, e.g.*, INTV Comments at 15-16.

[95]Veronis, Suhler at 192.

D. Diversity in All Its Iterations Is Substantial and Would Not Be Affected Adversely by Common Ownership of Two Stations in Local Markets.

The Commission is concerned about viewpoint, source, and outlet diversity.[96] In this proceeding, which involves ownership limits, the focal point of analysis is outlet diversity (*i.e.*, the number of separately-owned media).[97] Outlet diversity has been viewed as one means of promoting viewpoint diversity.[98] Whereas no one would discount the benefits of diversity -- and, especially, viewpoint diversity in this nation's democracy -- , the common ownership of two local television stations, which involves a reduction in outlet diversity, no longer raises rational concerns that diversity in any of its forms would decline in any material way. First, such a diverse array of media outlets is available that common ownership of two local stations involves only a marginal decrease in raw outlet diversity. Second, maximizing outlet diversity via the current duopoly rule is more likely to stifle than to promote viewpoint diversity.

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[96]*Further Notice*, 10 FCC Rcd at 3546.

[97]*Further Notice*, 10 FCC Rcd at 3549-50; NERA (LSOC) at 3. Outlet diversity in the sense of separately-owned or controlled outlets is synonymous with "voice" diversity. The critical form of diversity in a democracy is voice diversity, which assures that issues of concern are addressed from a multiplicity of distinct perspectives. If outlet diversity were defined to look only to the number of outlets, irrespective of ownership, then it would not be synonymous with voice diversity. It still would be a factor worthy of consideration. For example, increasing the number of outlets provides additional program choices for consumers, regardless of whether it increases voice diversity.

[98]*Further Notice* , 10 FCC Rcd at 3549-3950.

Also at the outset, LSOC notes that the Commissions' concern about diversity may be needless. First, the EI Study has noted that "there is no clear connection between viewpoint diversity and consumer welfare."[99] Second, as also pointed out by the EI Study:

> [S]ensibly defined "diversity markets" are likely to be broader and less concentrated than relevant economic or antitrust markets.[100]
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> * * *
>
> Hence, the application of antitrust standards to the problem of local media concentration will indirectly imply a higher standard for diversity purposes because the antitrust laws will operate to stop concentrations for economic reasons long before they pose significant diversity risks.[101]

Thus, the Commission may be tilting at windmills in pursuing a regulatory strategy designed to maximize diversity.

In any event, diversity would not be at risk when two television stations in the same market merge. Indeed, artificial limits on local ownership more likely tend to reduce diversity.

1. Media outlet diversity is substantial and increasing.

Every television market today is served by a wide variety of separately-owned media outlets. Each of these separately-owned media and many of the channels they distribute constitute a separate "voice" in the market. This includes broadcast

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[99]EI Study at 50.

[100]EI Study at 48.

[101]EI Study at 59.

television, radio, cable television, newspapers, and other emerging multichannel video providers.[102] Although the Commission rightly has concluded that "it is unrealistic to consider broadcast television station ownership in isolation when analyzing outlet diversity, it has remained -- inappropriately, in LSOC's view -- reticent to embrace media other than broadcast and cable television as contributing to diversity."[103] Such a restricted view of which media to include in assessing the level of diversity enjoys no support in the record.

All media contribute to outlet diversity. Separately owned media contribute to voice diversity. As the record demonstrates, none of the reasons relied on by the Commission are sufficient to dismiss or discount the contribution of these other media to diversity. First, the Commission dismisses DBS, MMDS, VCRs, and OVS (*nee* VDT) because "[n]one of these has nearly the ubiquity of cable and most do not have the capability for local origination that cable has."[104] The Commission also relies on the perception that they "[a]ll provide similar entertainment programming."[105] Ubiquity, of course, must be assessed on a market-by-market basis. LSOC hardly would urge counting media which have yet to penetrate a

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[102]The description of media available in the Cedar Rapids-Waterloo-Dubuque television market (DMA) is illustrative. *See* Comments of Cedar Rapids Television Company at 2-4.

[103]*Further Notice,* 10 FCC Rcd at 3553.

[104]*Further Notice,* 10 FCC Rcd at 3557.

[105]*Further Notice,* 10 FCC Rcd at 3557.

particular local market. DBS, however, is ubiquitous, and should be considered available in all markets.[106] Moreover, the capability for local origination may not be considered a prerequisite for inclusion in a diversity analysis. Programs focusing on national issues often address local needs and interests.[107] The Commission also errs in considering these media as purely sources of entertainment programming. Many carry such channels as CNN, C-SPAN, CNBC, and other news and public affairs channels. Furthermore, drawing a line between news and public affairs on one hand and entertainment on the other is artificial and arbitrary. Many entertainment programs attack issues of widespread concern. Program channels which provide entertainment also provide news (*e.g.*, MTV, the Family Channel).[108] The Commission's reasoning, therefore, simply fails to withstand analysis.

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[106]The fact that one must purchase equipment and subscribe to DBS provides no basis for exclusion of DBS from a diversity analysis. One also must purchase a set (and, possibly, an antenna) to view broadcast television, one must subscribe to receive cable television programming. *See* LSOC Comments at 25-26. Furthermore, no reason exists to exclude media that are not free in the same sense that broadcast television is free. *See* EI Study at 54.

[107]As observed by INTV:

> There is no bright line between local, nation and even international issues. Does a nationally distributed program addressing problems of drugs in school impact on local decision makers? Yes it does. Are issues such as the federal deficit local? Many members of Congress can testify to the fact that this issue has significant local impact.

INTV Comments at 21.

[108]*See* INTV Comments at 20.

The Commission is on equally thin ice in discounting the contribution of individual radio stations and newspapers to viewpoint diversity. First, the Commission claims that newspapers lack the immediacy of television. The logical nexus between immediacy and voice or viewpoint diversity is far from plain. If a television station covers a major fire in its 11 p.m. news, and a local newspaper publishes an editorial critical of the city's fire department in its morning edition the next day, one might readily suggest that the newspaper's editorial contributes as much, if not more, to the debate about local fire protection.[109] Moreover, the station and the newspaper, if separately owned, address the issue from antagonistic viewpoints, regardless of when they address the issue.

Second, the Commission would discount newspapers because they have no governmentally-imposed public interest obligations. This is absurd. Does CNN make less a contribution to diversity because the government did not require Ted Turner to start-up this channel or now Time-Warner to maintain it? As noted by The EI Study, "Newspapers, under no such 'obligations' as broadcasters, typically offer far more local news and public affairs coverage than broadcast stations."[110] Yet, the Commission would discount *The New York Times*, while according full weight to a home shopping station. Again, with respect to outlet and viewpoint diversity,

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[109]As CBS observes, as well, "It seems to obvious to state that no issue of significance can be resolved within the time frame of a radio or television news bulletin." Comments of CBS, Inc., MM Docket No. 91-221 (filed May 17, 1995) at 13 [hereinafter cited as "CBS Comments"].

[110]EI Study at 53.

separately-owned media offer antagonistic views whether the program or article is required of them by the government or not!

Third, the Commission would discount radio and newspapers because they lack the visual impact of television.[111] Were readers of newspapers showing the photo of the then 11-year-old Vietnamese girl, singed to the skin by napalm and running in a panic from her bombed-out village, less confronted with a viewpoint about the war in Viet Nam than viewers of a roundtable discussion about the war? Are viewers who watch investigators probe the smoldering debris of a crashed plane better informed about air safety than readers of a comprehensive story and related articles about the crash in the next day's newspaper? Has the human imagination so atrophied in the age of television that a radio bulletin reporting the plane crash would fall on deaf ears? Indeed, if the Commission is correct, then commenting parties in this proceeding should be submitting videotapes of presentations of their viewpoints, rather than written comments! As the EI Study states:

> Video programming is only one source of viewpoints for consumers....All media that expose consumers to viewpoints should be weighed in measuring diversity. These include television and other video services, radio, newspapers, magazines, books, direct mail, door-to-door leaflets and live discussions.[112]

The Commission, therefore, must avoid setting national policy on the basis of what is little more than an artistic judgment and a bad one at that.

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[111] *Further Notice,* 10 FCC Rcd at at 3558.

[112] EI Study at 53.

Fourth, the Commission would discount radio and newspapers because they are used by fewer people as a primary news source.[113] Nothing could be more grossly antithetical to the traditions of free expression and a free press in this country. It suggests that only purveyors of popular viewpoints are worthy of consideration; if one's newspaper expresses the viewpoint of a small minority, it contributes nothing to diversity of viewpoints. Such a proposition is ludicrous.[114] It also defies common sense. Just because someone uses television as his or her primary news source hardly suggests that he or she never reads a newspaper or reads a magazine or listens to the radio.[115]

Finally, the Commission frets that counting only news/talk radio stations would "not square" with its hands-off policy regarding program formats.[116] True enough, but this cannot obscure the fact that all radio stations, like all television stations, are required to present programming which addresses issues of local concern. The Commission, therefore, may easily and logically treat all radio and television stations in like manner for diversity purposes.

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[113] *Further Notice*, 10 FCC Rcd at 3557-58.

[114] LSOC is not suggesting that the Commission is out to stifle freedom of expression in this proceeding. However, when concepts of popularity are mingled with concepts of viewpoint diversity, no one should hesitate to remind the Commission of the undoubtedly unintended implications of its analysis.

[115] *See* EI Study at 54-55.

[116] *Further Notice*, 10 FCC Rcd at 3557-3558.

The Commission's narrow approach to diversity is demonstrably arbitrary and irrational. Neither logic nor practical reality offers a shred of support to the Commission's exclusion of any existing media from its diversity analysis. Therefore, all media available in a market must be considered in determining whether joint ownership of two television stations in the market would pose a material threat to diversity.

2. Multichannel media provide multiple voices.

The Commission also has determined not to "count, for diversity purposes, each channel on a cable system as a substitute for a broadcast television station."[117] LSOC disagrees. Whereas a channel for channel comparison might fail to account for channels provided by affiliated networks, cable systems offer programming from a number of diverse providers.[118] For example, looking to the so-called "top 40" cable networks, those channels come from a variety of sources. Whereas every channel might not come from a diverse source either with respect to the cable operator or another channel on the system, many do come form sources unaffiliated and unrelated to the system operator and any other channel on the system. Each unaffiliated channel, therefore, must be considered a separate "voice" in any diversity analysis.

[117] *Further Notice*, 10 FCC Rcd at 3556.

[118] *See* INTV Comments at 9, 19-20.

Furthermore, cable systems function much more like open conduits than control valves with respect to the content of programming distributed to subscribers. The key editorial function of a cable operator is to select among various channels of programming, not among particular programs or portions thereof. Consequently, the viewpoints expressed on program channels invariably pass through the cable system conduit unattenuated by any editorial control by the cable operator. The same is true of DBS, MMDS, OVS, and other multichannel providers, which invariably select networks from the same array of well-known cable networks.

Therefore, whereas the Commission should not necessarily consider each cable or DBS channel a distinct voice, it should take into account the various voices represented among the channels carried by each cable system.

In this "information age" environment, concerns about common ownership of two television stations in the same market are sub-marginal. Consumers will continue to have access to numerous, separately-owned media and channels of communication, both electronic and nonelectronic. Viewpoint monopolization in such an environment hardly would flow from the merger of two local television stations. Therefore, the Commission must recognize that the diversity costs of relaxing the duopoly rule as proposed by LSOC would be nil.

3. Insisting that each station in a market be separately owned reduces diversity.

Maintaining the current absolute prohibition on common ownership is likely to impose considerable costs, including diversity costs. As the EI Study concluded, "[T]he impact of the rules is chiefly to impose an inefficiently small form of organization on the broadcasting industry" and "prevent the broadcasting industry from operating at minimum cost."[119]

By raising the cost of doing business above efficient levels, the rules have functioned to reduce both the number of operating stations and the quality of service provided by some existing stations. Thus, consumers have fewer program outlets. Furthermore, they likely have less diverse programming. The EI Study states:

> For example, a firm in control of two channels may program the two channels so as to reach different audiences, whereas two single-channel competitors may each seek to reach the larger audience, and thus duplicate programming.[120]

Sinclair Broadcast Group, Inc., similarly states in more practical terms,

> [I]n the markets where Sinclair has LMAs, the Sinclair owned-and-operated station is the Fox affiliate -- whereas the stations being programmed by Sinclair are affiliated with another network (in most cases, the emerging United Paramount ("UPN") or Warner Brothers network) and have completely different slates of syndicated entertainment programming....[S]tations involved in most television

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[119]EI Study at 50.

[120]EI Study at 50. The Commission is no stranger to this line of thought. *Further Notice,* 10 FCC Rcd at 3550.

> LMAs are very much distinct in their images and their program offerings.[121]

Thus, the current focus on maximizing the number of separately-owned outlets has involved costs in the number of outlets and diversity of programming.

In sum, the common ownership of two stations in the same market would involve at worst a nominal reduction in voice diversity -- something of no material consequence in the incredibly diverse media marketplace of today -- and very likely would enhance source and viewpoint diversity in the market. As observed by Haring and Shooshan:

> In our view, just as increased group ownership would likely foster more effective exploitation of operating efficiencies, relaxation on consolidation of ownership of stations in local markets would similarly allow more efficient operations. The theoretical/common sense arguments are that there would be significantly beneficial consequences in terms of operating efficiencies if greater resource sharing in terms of administration, marketing and technical facilities could be achieved. Relaxation of these rules could also promote greater diversity of local programming. To the extent that the Commission has been concerned about promoting maximum diversity of viewpoints (*i.e.*, editorial diversity), any reduction that *might* result from elimination of the duopoly rule will be more than offset by the additional local "voices" provided by cable, wireless cable and ultimately telephone company video services. Moreover in a world where a single cable operator can control up to 500 channels in a local market, the duopoly rules (and restrictions on LMAs or other arms-length deals among local broadcasters) unfairly restrict broadcasters from competing and have the effect of regulating over-the-air broadcasting and its viewers and listeners to second class status.[122]

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[121]Comments of Sinclair Broadcast Group, Inc., MM Docket No. 91-221 (filed May 17, 1995) at 3 [hereinafter cited as "Comments of Sinclair Broadcast Group"].

[122]Haring-Shooshan at 17.

In sum, the Commission's traditional concern about diversity has vanished in a blaze of emergent and now established media such as cable television.[123]

E. Common Ownership of Two Stations in the Same Market Will Strengthen Weaker Stations, Which Then Will Enhance Competition in Each of the Relevant Markets.

When the Commission first issued a notice of proposed rule making in this proceeding, it believed its ownership rules "needed to be amended in order to strengthen the potential of over-the-air television to compete in the current video marketplace and enhance its ability to bring increased choice to consumers."[124] The truth and gravity of this statement is no more apparent than in the case of the local ownership rules. Local broadcast television stations compete in an increasingly competitive market. They compete against a now entrenched and mature cable industry and a host of other multichannel video providers. Furthermore, they compete with one channel versus the multiplicity of channels provided by their video provider competitors. They derive revenue from a single source, advertising, while their competitors enjoy multiple revenue streams.[125] Their competitors remain largely unfettered and free to pursue the efficiencies of horizontal and vertical integration. Meanwhile, broadcast licensees remain barred from achieving the efficiencies of combined operations by the duopoly rule. Relaxation of the

[123]Haring-Shooshan at 17.

[124]*Further Notice*, 10 FCC Rcd at 3529.

[125]LSOC Comments at 8-9.